

## MEMORANDUM

TO: All CJA Members

FROM: Stanley S. Bissey  
Executive Director & CEO

DATE: January 2018

SUBJECT: **Formal Ethics Opinion No. 74**

The Judicial Ethics Committee of the California Judges Association has issued the following formal opinions:

**Opinion No. 74**

*"Judicial Responsibilities When Discovering Attorney Misconduct  
(Canon 3D(2))"*

Judges may direct questions on the Code of Judicial Ethics to the current 2017/18 Ethics Committee by writing or calling the CJA office or any Ethics Committee member. The Ethics Committee, as a matter of policy, does not answer inquiries which are moot or raise issues of law. Nor does the Committee respond to questions that involve matters pending before the Commission on Judicial Performance.

All opinions of the committee are advisory only.

Special thanks to Ethics Committee member Judge Leonard Edwards, Santa Clara Superior Court, Retired, for preparing this Opinion.

SSB:jmg

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# CALIFORNIA JUDGES ASSOCIATION

## Judicial Ethics Committee

### Opinion No. 74

#### Judicial Responsibilities When Discovering Attorney Misconduct (Canon 3D(2))

## I. INTRODUCTION

The Code of Judicial Ethics Canon 3D(2) obligates judges to take corrective action whenever the judge has personal knowledge or concludes in a judicial decision that an attorney has committed misconduct or violated the Rules of Professional conduct.

The language in the canon suggests further discussion regarding the following issues: (1) what actions constitute attorney misconduct? (2) If the judge concludes that the attorney committed misconduct or violated the Rules of Professional Conduct, what action should the judge take? (3) What types of corrective action will satisfy the judge's obligation? This opinion will address these issues.

## II. APPLICABLE AUTHORITY

### Canon 3D. Disciplinary Responsibilities

(2) "Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority."

### ADVISORY COMMITTEE COMMENTARY: Canons 3D

*Appropriate corrective action could include direct communication with the ... lawyer who has committed the violation, other direct action, such as a confidential referral to a ... lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body. Judges should note that in addition to the action required by Canon 3D(2), California law imposes additional mandatory reporting requirements to the State Bar on judges regarding lawyer misconduct. See Business and Professions Code sections 6086.7 and 6086.8, subdivision (a), and California Rules of Court, rules 10.609 and 10.1017.*

*“Appropriate authority” means the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported.*

(4) A judge shall cooperate with judicial and lawyer disciplinary agencies.

(5) A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

#### **Cal. Bus. & Prof. Code § 6086.7**

(a) A court shall notify the State Bar of any of the following:

(1) A final order of contempt imposed against an attorney that may involve grounds warranting discipline under this chapter. The court entering the final order shall transmit to the State Bar a copy of the relevant minutes, final order, and transcript, if one exists.

(2) Whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney.

(3) The imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

(4) The imposition of any civil penalty upon an attorney pursuant to Section 8620 of the Family Code.

(5) A violation described in paragraph (1) of subdivision (a) of Section 1424.5 of the Penal Code by a prosecuting attorney, if the court finds that the prosecuting attorney acted in bad faith and the impact of the violation contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.

(b) In the event of a notification made under subdivision (a) the court shall also notify the attorney involved that the matter has been referred to the State Bar.

#### **Cal. Bus. & Prof. Code § 6086.8**

(a) Within 20 days after a judgment by a court of this state that a member of the State Bar of California is liable for any damages resulting in a judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence com-

mitted in a professional capacity, the court which rendered the judgment shall report that fact in writing to the State Bar of California.

### **Penal Code § 1424.5**

(a) (1) Upon receiving information that a prosecuting attorney may have deliberately and intentionally withheld relevant or material exculpatory evidence or information in violation of law, a court may make a finding, supported by clear and convincing evidence, that a violation occurred. If the court finds such a violation, the court shall inform the State Bar of California of that violation if the prosecuting attorney acted in bad faith and the impact of the withholding contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.

(2) A court may hold a hearing to consider whether a violation occurred pursuant to paragraph (1).

(b) (1) If a court finds, pursuant to subdivision (a), that a violation occurred in bad faith, the court may disqualify an individual prosecuting attorney from a case.

(2) Upon a determination by a court to disqualify an individual prosecuting attorney pursuant to paragraph (1), the defendant or his or her counsel may file and serve a notice of a motion pursuant to Section 1424 to disqualify the prosecuting attorney's office if there is sufficient evidence that other employees of the prosecuting attorney's office knowingly and in bad faith participated in or sanctioned the intentional withholding of the relevant or material exculpatory evidence or information and that withholding is part of a pattern and practice of violations.

### **California Rules of Court, Rule 10.609. Notification to State Bar of attorney misconduct**

(a) Notification by judge

When notification to the State Bar is required under Business and Professions Code section 6086.7, the judge issuing the order that triggers the notification requirement under section 6086.7 is responsible for notifying the State Bar. The judge may direct court staff to notify the State Bar.

(b) Contents of notice

The notice must include the State Bar member's full name and State

Bar number, if known, and a copy of the order that triggered the notification requirement.

(c) Notification to attorney

If notification to the State Bar is made under this rule, the person who notified the State Bar must also inform the attorney who is the subject of the notification that the matter has been referred to the State Bar.

**California Rules of Court, Rule 10.1017. Notification to State Bar of attorney misconduct**

(a) Notification by justice

When notification to the State Bar is required under Business and Professions Code section 6086.7, the senior justice issuing the order or the justice authoring the opinion that triggers the notification requirement under section 6086.7 is responsible for notifying the State Bar. The justice may direct the clerk to notify the State Bar.

(b) Contents of notice

The notice must include the State Bar member's full name and State Bar number, if known, and a copy of the order or opinion that triggered the notification requirement.

(c) Notification to attorney

If notification to the State Bar is made under this rule, the person who notified the State Bar must also inform the attorney who is the subject of the notification that the matter has been referred to the State Bar.

*Commission on Judicial Performance, Annual Report (1991), Advisory Letter 9, p.12*

*State Bar of California, Rules of Professional Conduct, Rule 3-110 - Failing to Act Competently and Rule 5-200 – Trial Conduct.*

*Rothman, David, California Judicial Conduct Handbook, 3rd Edition, Section 5.67-5.68.*

### III. DISCUSSION

Most judges will encounter attorney misconduct during their judicial careers. Identifying the misconduct and then acting on it raises a number of issues for the judge. The judicial obligations regarding attorney misconduct differ from those involving judicial misconduct (Code of Judicial Ethics, Canon 3D(1). Pursuant to the Code of Judicial Ethics, Canon 3D(2), the judge must have personal knowledge or conclude in a judicial decision that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct. In both situations the judge shall take appropriate corrective action which may include reporting the violation to the appropriate authority. (emphasis added).

As indicated above, the obligation to take corrective action is only triggered where the judge has personal knowledge that an attorney has committed misconduct or has violated the Rules of Professional Conduct, or concludes in a judicial decision that the attorney has committed misconduct or violated the Rules of Professional Conduct. Having credible information that an attorney has committed misconduct does not trigger the obligation to take corrective action. Therefore, unless the misconduct is the subject of a judicial decision, the first question becomes whether the judge has personal knowledge. That question can be answered by asking whether the judge would be able testify to the misconduct as a percipient witness. If not, the judge cannot be said to have personal knowledge.

Where a judge does have personal knowledge or concludes in a judicial decision that an attorney has committed misconduct or violated the Rules of Professional Conduct, the next question becomes what is an appropriate corrective action. Some violations require the judge to report the misconduct to the State Bar. The mandatory reporting provisions are found in Business and Professions Code sections 6086.7 and 6086.8(a) and Penal Code section 1424.5. Unless one or more of the circumstances listed in those sections applies, a judge normally may, but is not required to, report the matter to the State Bar. However, there have been circumstances in the past where because of the nature of the misconduct, the committee has concluded that reporting the misconduct to the State Bar was the appropriate corrective action. Those situations may arise where the misconduct is particularly egregious, has continued despite prior attempts at corrective action, or where the judge believes other normally appropriate authorities will not take any action.

The following hypotheticals are designed to assist judges in determining under what circumstances a reporting responsibility arises, what may be an appropriate corrective action, and when reporting to the matter to the State Bar is required.

*#1 –A judge discovers that an attorney under a 30-day suspension from the State Bar has appeared before the judge during the 30-day period.*

*Must the judge take any action, and if so what action should the judge take?*

The judge must take appropriate corrective action. The misconduct occurred in front of the judge within the courtroom, so the judge has personal knowledge of the misconduct. Although not one of the circumstances listed in Cal. Bus. & Prof. Code §6086.7, practicing law while suspended is a particularly egregious violation and no corrective action short of reporting the matter to the State Bar would be effective. Thus, the judge should notify the State Bar of the attorney's misconduct.

*#2 – Based on personal observations of an attorney, including exhibiting signs of intoxication in court, repeatedly missing court dates, and improper performance, a judge believes the attorney has a substance abuse problem.*

*Must the judge take any action, and if so what action should the judge take?*

Where, as here, a judge has personal knowledge that an attorney's competence is being affected by substance abuse, the judge has a duty to take appropriate corrective action. While the judge may refer the matter to the State Bar, the judge is not required to do so. Appropriate corrective action may include referring the attorney to substance abuse program such as the Other Bar<sup>1</sup> and asking the attorney to report back to the judge regarding the course of action taken. If the attorney fails to act, the judge should report the attorney to the State Bar.<sup>2</sup>

*#3 –A Supervising Judge observes copy of an advertisement in the yellow pages wherein an attorney is advertising that he/she is a judge pro tem serving in the judge's court.*

*Must the judge take any action, and if so what action should the judge take?*

Since the supervising judge has personal knowledge of the advertisement, the supervising judge must take appropriate corrective action that may include informing the attorney that this is a violation of the Canons and to cease and desist or referring the matter to the Presiding Judge.

*#4 –A judge learns that an attorney resigned from the State Bar prior to the attorney making several appearances before the judge.*

*Must the judge take any action, and if so what action should the judge take?*

Since the judge has personal knowledge of the violation, the judge has a duty to take appropriate corrective action. While none of the per se mandatory reporting provisions apply, the former attorney has essentially committed a

crime in the courtroom. Under these circumstances the judge should report the conduct to the State Bar.

*#5 – A judge has personal knowledge that a lawyer has violated a provision of the Rules of Professional Conduct. The judge learned of this violation at an in camera hearing to determine if the lawyer had a conflict of interest.*

*Must the judge take any action, and if so what action should the judge take?*

The judge should take appropriate corrective action which in this case may be conferring with the attorney, reporting the matter to the Presiding Judge, or the judge may make a referral to the State Bar. However, the judge must take care not to disclose any confidential information. Whatever corrective action is taken, the judge must ensure that the attorney's client's rights are protected.

*#6 - A judge receives a declaration from an attorney that contains a statement that, based on the judge's personal knowledge, the judge knows to be false.*

*Must the judge take any action, and if so what action should the judge take?*

The judge must take appropriate corrective action, which could include counseling the attorney, discussing the matter with the attorney's supervisor, and possibly reporting the matter to the State Bar.

*#7 – After a hearing alleging prosecutorial misconduct, the judge has concluded that a deputy district attorney has committed perjury. Further the judge has reason to believe the attorney's direct supervisor will not report it or take any corrective action.*

*Must the judge take any action, and if so what action should the judge take?*

Since the judge has concluded in a judicial decision that the deputy district attorney has committed misconduct, the judge must take appropriate corrective action. This could include discussing the matter with the elected District Attorney. If no action is taken by the District Attorney, the judge should report the matter to the State Bar.<sup>3</sup>

*#8 – A judge grants a motion to vacate a judgment based on incompetency of counsel.*

*Must the judge take any action, and if so what action should the judge take?*

Whenever a reversal of a judgment is based in whole or in part on incompetent representation, the judge must report the attorney to the State Bar and give notice to the attorney of the judge's actions.<sup>4</sup>



*#9 – A judge has reported an attorney’s unethical conduct to the State Bar and the State Bar’s investigator has contacted the judge for further information.*

*Must the judge take any action, and if so what action should the judge take?*

The judge must cooperate with the request for information from the State Bar’s investigator.

*#10 – A judge sets aside a final order of contempt regarding an attorney’s conduct.*

*Must the judge take any action, and if so what action should the judge take?*

Under these circumstances, the judge does not need to take any action. Since the contempt order was set aside, the judge is not under a duty report the original finding.<sup>5</sup>

*#11 – A judge notices that a deputy public defender is consistently late for court, is unprepared when cases are called, and seems to have poor relationships with his clients.*

*Must the judge take any action, and if so what action should the judge take?*

If the judge concludes that the deputy’s actions before that judge amount to ineffective assistance of counsel, the judge must take appropriate corrective action which could include speaking with attorney directly or discussing the matter with the deputy’s supervisor. In either case, the judge must be careful to avoid engaging in any ex parte communications regarding any matters still pending.

*#12 – A judge has been assigned a felony criminal case where the defendant is a practicing attorney.*

*Must the judge take any action, and if so what action should the judge take?*

Since the judge does not have any personal knowledge regarding the alleged felonious conduct, the judge is under no duty to take any action. However, if the attorney is convicted, the clerk in the judge’s court is required by law to report the conviction to the State Bar within 48 hours.<sup>6</sup>

*#13 – The judge learns that an attorney is terminally ill and believes that the treatment the attorney is receiving has affected the attorney to the point that the attorney’s clients may suffer due to the attorney’s disability.*

*Must the judge take any action, and if so what action should the judge take?*

The judge must take appropriate corrective action. This may be to consult with the attorney or those with whom the attorney practices. If these interventions are not effective, the judge should report the matter to the State Bar.

*#14 – During the course of a contentious trial one of the attorneys was repeatedly disrespectful to the court and ignored the court’s rulings. After warning the attorney to desist, the attorney persisted at which point the judge cited the attorney for contempt of court. After conducting a hearing, the judge issued a written order of contempt.*

*Must the judge take any action, and if so what action should the judge take?*

Once the order of contempt becomes final the judge must send a copy of the relevant minutes, the final order and transcript (if any) to the State Bar.<sup>7</sup>

*#15 – A judge becomes aware that a deputy district attorney is being rude and discourteous to administrative and courtroom personnel.*

*Must the judge take any action, and if so what action should the judge take?*

If the judge personally witnessed any of the offensive conduct, the judge must take appropriate corrective action which may include counseling the deputy or discussing the matter with the deputy’s supervisor.<sup>8</sup>

*#16 – During the course of a hearing on a motion for new trial, an attorney in the proceeding acknowledged she gained unauthorized access to criminal history information.*

*Must the judge take any action, and if so what action should the judge take?*

Under these facts, the judge has gained personal knowledge that the attorney has committed misconduct, therefore, the judge must take appropriate corrective action, which could include counseling the attorney, reporting the matter to law enforcement, or reporting the attorney to the State Bar.

*#17 – A retired judge sitting on assignment presided over a hearing wherein the petitioner requested a civil restraining order against an attorney. The judge granted the request.*

*Must the judge take any action, and if so what action should the judge take?*

Unless the judge issued the order based on actions of the lawyer that would amount to misconduct or a violation of the Rules of Professional Conduct, the judge is neither required to take any corrective action nor report the attorney to the State Bar.

*#18 – The judge rendered judgment against an attorney finding the attorney liable for damages resulting from fraud, misrepresentation, and breach of fiduciary duty committed in a professional capacity against a client.*

*Must the judge take any action, and if so what action should the judge take?*

The judge is under an obligation to report that fact in writing to the State Bar within 20 days. The judge must also inform the attorney of the judge's actions.<sup>9</sup>

*#19 – The judge imposed sanctions of \$750 against an attorney for the attorney's conduct in court.*

*Must the judge take any action, and if so what action should the judge take?*

Under these facts, the judge is under no obligation to take any further corrective action since the impositions of sanctions was in of itself corrective action for the attorney's conduct and the monetary amount imposed was less than \$1,000.<sup>10</sup>

*#20 – A judge hearing an adoption case discovered that the petitioner's attorney concealed the fact that the subject child was or might be a Native American child. The judge imposed a civil penalty against the attorney pursuant to Family Code section 8620.*

*Must the judge take any action, and if so what action should the judge take?*

Imposing any civil penalties against an attorney pursuant to Family Code section 8620 triggers the mandatory reporting provisions of Business and Professions Code section §6086.7(a)(4), therefore, the judge must report the matter to the State Bar.

*#21 – Following a criminal trial in which the defendant was convicted of the charges, the defendant brings a motion for new trial based on allegations that the prosecutor knowingly withheld exculpatory evidence. Following a hearing on the matter the judge concluded that the prosecuting attorney intentionally withheld the evidence in bad faith and granted the motion.*

*Must the judge take any action, and if so what action should the judge take?*

Implicit in the court's ruling is that the withholding of the evidence contributed to the guilty verdict, therefore the judge must notify the State Bar of the violation.<sup>11</sup>

*#22 – The judge heard an action for legal malpractice brought by a client against her attorney. The jury found for the plaintiff.*

*Must the judge take any action, and if so what action should the judge take?*

Based on these facts the judge may or may not be required to take any action. If the judgement was based on fraud, misrepresentation, or gross negligence in a professional capacity, the judge would have to report the judgment to the State Bar within twenty days.<sup>12</sup> If not, the judge is under no duty to take any action.

*#23 – The Court of Appeals has reversed a decision by a judge based on misconduct by one of the attorneys.*

*Must the justice take any action, and if so what action should the justice take?*

The appellate court must report the attorney to the State Bar and inform the attorney that the matter has been referred to the State Bar.<sup>13</sup>

*#24 – A judge has received declarations and taken testimony in which it is appears the attorneys for one side or the other have committed perjury or suborned perjury.*

*Must the judge take any action, and if so what action should the judge take?*

On these facts, the judge is not required to take any action. The judge lacks personal knowledge as to whom, if anyone is lying. If after further proceedings, the judge concludes in a judicial decision that one of the attorneys committed perjury, the judge would have to take corrective action. Based on the egregious nature of the misconduct the corrective action should include reporting the attorney to the State Bar.

#### **IV. CONCLUSION**

From the law and the hypothetical situations, several conclusions can be drawn.

First, in certain situations involving attorney misconduct, the judge must take appropriate corrective action. Those situations include when the judge has personal knowledge or concludes in a judicial decision that an attorney has committed misconduct.

Second, depending on the circumstances, appropriate corrective action may include one or more of the following: direct communication with the attorney, discussing the matter with the attorney's supervisor, referring the attorney to a lawyer assistance program, reporting to an appropriate authority or other agency or body such as the State Bar, or referring the matter to law enforcement. "Appropriate authority" means the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported."

Third, there are situations when a judge must report an attorney to the State Bar as set forth in B & B Code §§6086.7 and 6086.8 and California Rules of Court, rules 10.609 and 10.1017. In these situations, the judge must also notify the attorney of the action taken pursuant to B & P Code §6086.

Fourth, if the judge becomes aware of criminal conduct by an attorney that takes place in the judge's courtroom, the judge's obligation to report the mat-

ter to law enforcement is the same as that of an ordinary citizen. However, if the judge is the only person who knows of illegal conduct by an attorney, the judge has a duty to report the matter to law enforcement.<sup>14</sup>

**Endnotes:**

- 1 The Other Bar is a network of recovering lawyers, law students, and judges throughout the state, dedicated to assisting others within the legal profession who are suffering from alcohol and substance abuse problems. The program is voluntary and open to all California lawyers, judges, and law students.
- 2 See California Judges Association, Judicial Ethics Update (1999) p. 3. Rule 3-110 of the State Bar Rules of Professional Conduct requires that a lawyer not “intentionally, recklessly, or repeatedly fail to perform legal services with competence.” Competence includes the “mental, emotional, and physical ability reasonably necessary for the performance of such service.” Rules of Professional Conduct, rule 3-110(B)(3).
- 3 California Judges Association, Judicial Ethics Update (2001) p.5
- 4 Bus. & Prof. Code § 6086.7(a) (2).
- 5 Bus. & Prof. Code § 6086.7(a) (1).
- 6 Bus. & Prof. Code § 6101(c).
- 7 Bus. & Prof. Code § 6086.7(a) (1).
- 8 If the conduct arose outside the judge’s presence, the judge may still have a duty act under Canon 3B(4) which requires a judge to ensure that lawyers and staff under the judge’s direction and control act in a patient dignified and courteous manner.
- 9 Bus. & Prof. Code § 6086.8.
- 10 Bus. & Prof. Code § 6086.7(a) (3).
- 11 Penal Code §1424.5 and Bus. & Prof. Code §§ 6086.7(2) and 6086.7(5).
- 12 Bus. & Prof. Code §6086.8(a)
- 13 Bus. & Prof. Code § 6086.7(a)(2).
- 14 Canon 3D(2) Advisory Committee Commentary
- 15 The conclusions throughout this document are consistent with the ABA Model Code of Judicial Conduct, Rule 2.15, Responding to Judicial and Lawyer Misconduct.

## **2017/18 JUDICIAL ETHICS COMMITTEE**

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**BUSINESS AND PROFESSIONS CODE - BPC**

**DIVISION 3. PROFESSIONS AND VOCATIONS GENERALLY [5000 - 9998.11]** ( *Heading of Division 3 added by Stats. 1939, Ch. 30.*  )

**CHAPTER 4. Attorneys [6000 - 6243]** ( *Chapter 4 added by Stats. 1939, Ch. 34.*  )

**ARTICLE 5. Disciplinary Authority of the Board of Governors [6075 - 6088]** ( *Article 5 added by Stats. 1939, Ch. 34.*  )

**6086.7.** (a) A court shall notify the State Bar of any of the following:

(1) A final order of contempt imposed against an attorney that may involve grounds warranting discipline under this chapter. The court entering the final order shall transmit to the State Bar a copy of the relevant minutes, final order, and transcript, if one exists.

(2) Whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney.

(3) The imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

(4) The imposition of any civil penalty upon an attorney pursuant to Section 8620 of the Family Code.

(5) A violation described in paragraph (1) of subdivision (a) of Section 1424.5 of the Penal Code by a prosecuting attorney, if the court finds that the prosecuting attorney acted in bad faith and the impact of the violation contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.

(b) In the event of a notification made under subdivision (a) the court shall also notify the attorney involved that the matter has been referred to the State Bar.

(c) The State Bar shall investigate any matter reported under this section as to the appropriateness of initiating disciplinary action against the attorney.

(Amended by Stats. 2015, Ch. 467, Sec. 1. (AB 1328) Effective January 1, 2016.)

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**CHAPTER 4. Attorneys [6000 - 6243]** ( *Chapter 4 added by Stats. 1939, Ch. 34.*  )

**ARTICLE 5. Disciplinary Authority of the Board of Governors [6075 - 6088]** ( *Article 5 added by Stats. 1939, Ch. 34.*  )

**6086.8.** (a) Within 20 days after a judgment by a court of this state that a licensee of the State Bar of California is liable for any damages resulting in a judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity, the court which rendered the judgment shall report that fact in writing to the State Bar of California.

(b) Every claim or action for damages against a licensee of the State Bar of California for fraud, misrepresentation, breach of fiduciary duty, or negligence committed in a professional capacity shall be reported to the State Bar of California within 30 days of receipt by the admitted insurer or licensed surplus brokers providing professional liability insurance to that licensee of the State Bar.

(c) An attorney who does not possess professional liability insurance shall send a complete written report to the State Bar as to any settlement, judgment, or arbitration award described in subdivision (b), in the manner specified in that subdivision.

(Amended by Stats. 2018, Ch. 659, Sec. 71. (AB 3249) Effective January 1, 2019.)



Code: Section: [Up^](#)[<< Previous](#)[Next >>](#)[cross-reference chaptered bills](#)[PDF |](#)[Add To My Favorites](#)**PENAL CODE - PEN****PART 2. OF CRIMINAL PROCEDURE [681 - 1620]** *( Part 2 enacted 1872. )***TITLE 10. MISCELLANEOUS PROCEEDINGS [1268 - 1424.5]** *( Title 10 enacted 1872. )***CHAPTER 15. Disqualification of Prosecuting Attorneys [1424 - 1424.5]** *( Chapter 15 added by Stats. 1980, Ch. 780, Sec. 1. )*

**1424.5.** (a) (1) Upon receiving information that a prosecuting attorney may have deliberately and intentionally withheld relevant, material exculpatory evidence or information in violation of law, a court may make a finding, supported by clear and convincing evidence, that a violation occurred. If the court finds such a violation, the court shall inform the State Bar of California of that violation if the prosecuting attorney acted in bad faith and the impact of the withholding contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.

(2) A court may hold a hearing to consider whether a violation occurred pursuant to paragraph (1).

(b) (1) If a court finds, pursuant to subdivision (a), that a violation occurred in bad faith, the court may disqualify an individual prosecuting attorney from a case.

(2) Upon a determination by a court to disqualify an individual prosecuting attorney pursuant to paragraph (1), the defendant or his or her counsel may file and serve a notice of a motion pursuant to Section 1424 to disqualify the prosecuting attorney's office if there is sufficient evidence that other employees of the prosecuting attorney's office knowingly and in bad faith participated in or sanctioned the intentional withholding of the relevant, material exculpatory evidence or information and that withholding is part of a pattern and practice of violations.

(c) This section does not limit the authority or discretion of, or any requirement placed upon, the court or other individuals to make reports to the State Bar of California regarding the same conduct, or otherwise limit other available legal authority, requirements, remedies, or actions.

*(Amended by Stats. 2016, Ch. 59, Sec. 7. (SB 1474) Effective January 1, 2017.)*



## 2019 California Rules of Court

### **Rule 10.609. Notification to State Bar of attorney misconduct**

#### **(a) Notification by judge**

When notification to the State Bar is required under Business and Professions Code section 6086.7, the judge issuing the order that triggers the notification requirement under section 6086.7 is responsible for notifying the State Bar. The judge may direct court staff to notify the State Bar.

#### **(b) Contents of notice**

The notice must include the State Bar member's full name and State Bar number, if known, and a copy of the order that triggered the notification requirement.

#### **(c) Notification to attorney**

If notification to the State Bar is made under this rule, the person who notified the State Bar must also inform the attorney who is the subject of the notification that the matter has been referred to the State Bar.

*Rule 10.609 adopted effective January 1, 2014.*

#### **Advisory Committee Comment**

Business and Professions Code section 6086.7 requires a court to notify the State Bar of any of the following: (1) a final order of contempt imposed on an attorney that may involve grounds warranting discipline under the State Bar Act; (2) a modification or reversal of a judgment in a judicial proceeding based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney; (3) the imposition of any judicial sanctions on an attorney of \$1,000 or more, except sanctions for failure to make discovery; or (4) the imposition of any civil penalty on an attorney under Family Code section 8620. If the notification pertains to a final order of contempt, Business and Professions Code section 6086.7(a)(1) requires the court to transmit to the State Bar a copy of the relevant minutes, final order, and transcript, if one exists. This rule is intended to clarify who has the responsibility of notifying the State Bar under section 6086.7 and the required contents of the notice.

In addition to the requirements stated in Business and Professions Code section 6086.7, judges are subject to canon 3D(2) of the California Code of Judicial Ethics, which states: "Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority." The Advisory Committee Commentary states: "Appropriate corrective action could include direct communication with the judge or lawyer who has committed the violation, other direct action, such as a confidential referral to a judicial or lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body. Judges should note that in addition to the action required by Canon 3D(2), California law imposes mandatory additional reporting requirements on judges regarding lawyer misconduct. See Business and Professions Code section 6086.7."

[\[ Back to Top \]](#)



## 2019 California Rules of Court

### **Rule 10.1017. Notification to State Bar of attorney misconduct**

#### **(a) Notification by justice**

When notification to the State Bar is required under Business and Professions Code section 6086.7, the senior justice issuing the order or the justice authoring the opinion that triggers the notification requirement under section 6086.7 is responsible for notifying the State Bar. The justice may direct the Clerk to notify the State Bar.

#### **(b) Contents of notice**

The notice must include the State Bar member's full name and State Bar number, if known, and a copy of the order or opinion that triggered the notification requirement.

#### **(c) Notification to attorney**

If notification to the State Bar is made under this rule, the person who notified the State Bar must also inform the attorney who is the subject of the notification that the matter has been referred to the State Bar.

*Rule 10.1017 adopted effective January 1, 2014.*

#### **Advisory Committee Comment**

Business and Professions Code section 6086.7 requires a court to notify the State Bar of any of the following: (1) a final order of contempt imposed on an attorney that may involve grounds warranting discipline under the State Bar Act; (2) a modification or reversal of a judgment in a judicial proceeding based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney; (3) the imposition of any judicial sanctions on an attorney of \$1,000 or more, except sanctions for failure to make discovery; or (4) the imposition of any civil penalty on an attorney under Family Code section 8620. If the notification pertains to a final order of contempt, Business and Professions Code section 6086.7(a)(1) requires the court to transmit to the State Bar a copy of the relevant minutes, final order, and transcript, if one exists. This rule is intended to clarify which justice has the responsibility of notifying the State Bar under section 6086.7 and the required contents of the notice.

In addition to the requirements stated in Business and Professions Code section 6086.7, judges are subject to canon 3D(2) of the California Code of Judicial Ethics, which states: "Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority." The Advisory Committee Commentary states: "Appropriate corrective action could include direct communication with the judge or lawyer who has committed the violation, other direct action, such as a confidential referral to a judicial or lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body. Judges should note that in addition to the action required by Canon 3D(2), California law imposes mandatory additional reporting requirements on judges regarding lawyer misconduct. See Business and Professions Code section 6068.7."

[\[ Back to Top \]](#)

# **CALIFORNIA JUDICIAL CONDUCT HANDBOOK**

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**Hon. RICHARD D. FYBEL**

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California Judges Foundation  
California Judges Association  
Judicial Council of California



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**§ 5:67 Appropriate action regarding attorneys**

A judge who has “personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, shall take appropriate corrective action.”<sup>431</sup> It should be noted that the duty to report another judge requires a lesser level of information (“reliable information”) than the duty to report an attorney (“personal knowledge”).<sup>432</sup> This, of course, does not mean that a judge is prohibited from reporting an attorney if the report is based upon something other than “personal knowledge.”

**Judicial obligations under the Business and Professions Code.**

If a contempt holding against an attorney involves conduct that may warrant discipline by the State Bar, as in the case of a breach of the duties set forth in Business and Professions Code section 6068, the court “shall notify the State Bar” by transmitting a copy of the final order of contempt, relevant minutes and transcript if one exists.<sup>433</sup>

In addition, a judge is required to report an attorney “[w]henever a modification or reversal of a judgment . . . is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney.”<sup>434</sup> A court is also required by statute to notify the State Bar of “any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).”<sup>435</sup>

In each of the above instances, the court is required to notify the attorney involved that the matter has been referred to the State Bar.<sup>436</sup>

There are two rules of court that provide additional information about (1) who specifically in the court is responsible for notifying the State Bar and the attorney who is the subject of the notification, and (2) what the notifications must contain. For trial court judges, the judge who issues the order that triggers the reporting requirement is responsible for notifying the State Bar and the attorney, although the judge may direct court staff to perform these tasks.<sup>437</sup> The rule also specifies that the notice must include the attorney’s name and State Bar number, if known, as well as a copy of the order that triggered the notification requirement.<sup>438</sup>

For appellate courts, the senior justice who issues the order or the

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**[Section 5:67]**

<sup>431</sup>Cal. Code Jud. Ethics, canon 3D(2).

<sup>432</sup>Compare *id.*, canon 3D(1) with *id.*, canon 3D(2).

<sup>433</sup>Bus. & Prof. Code, § 6086.7, subd. (a)(1).

<sup>434</sup>*Id.*, § 6086.7, subd. (a)(2).

<sup>435</sup>*Id.*, § 6086.7, subd. (a)(3).

<sup>436</sup>*Id.*, § 6086.7, subd. (b).

<sup>437</sup>Cal. Rules of Court, rule 10.609(a) & (c).

<sup>438</sup>*Id.*, rule 10.609(b).

justice who authors the opinion that prompts the notification is responsible for reporting the matter to the State Bar and notifying the attorney. The justice may direct the Clerk to submit the report and inform the attorney.<sup>439</sup> The notice must include the attorney's name and bar number, if known, and a copy of the order or opinion that triggered the reporting requirement.<sup>440</sup>

A court rendering a judgment finding a lawyer liable "for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity" is also required to report that fact to the State Bar.<sup>441</sup>

Finally, the clerk of the court in which an attorney is convicted of a crime is required, within 48 hours, to transmit to the State Bar the record of conviction.<sup>442</sup>

**Impropriety of lodging or threatening to lodge an unfounded complaint.** A note of caution is appropriate regarding reporting an attorney or, for that matter, a judicial colleague. It is improper for a judge to lodge an unfounded or insubstantial report in order to retaliate against the attorney.<sup>443</sup> Thus, while a judge has a duty to report an attorney under the circumstances discussed above, improper reporting, e.g., in apparent retaliation for the attorney's criticism of the judge, may subject the judge to discipline.<sup>444</sup> A judge was disciplined for reporting an attorney to the State Bar after the attorney refused to endorse a plea bargain. The basis for the report was that the judge heard from an unspecified source the attorney had a conflict of interest.<sup>445</sup>

It is also improper for a judge to threaten to report an attorney to the State Bar without a valid basis.<sup>446</sup> A judge was disciplined for, in the presence of the attorney's client, threatening to report an attorney to the State Bar when the attorney sought to continue a preliminary hearing on the day of the hearing (without advance notice to the prosecution) and was unable to proceed.<sup>447</sup>

**Determination that counsel is incapable of performing duties.** Judges are occasionally in the position to observe attorneys in court who are under the influence of alcohol or drugs, or are suffering from mental

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<sup>439</sup>*Id.*, rule 10.1017(a) & (c).

<sup>440</sup>*Id.*, rule 10.1017(b).

<sup>441</sup>Bus. & Prof. Code, § 6086.8, subd. (a).

<sup>442</sup>*Id.*, § 6101, subd. (c).

<sup>443</sup>Com. on Jud. Performance, Ann. Rep. (2008), Private Admonishment 5, p. 26.

<sup>444</sup>Com. on Jud. Performance, Ann. Rep. (1992), Advisory Letter 14, p. 15.

<sup>445</sup>Com. on Jud. Performance, Ann. Rep. (1990), Advisory Letter 12, p. 22.

<sup>446</sup>Com. on Jud. Performance, Ann. Rep. (2014), Private Admonishment 5, p. 21.

<sup>447</sup>Com. on Jud. Performance, Ann. Rep. (2015), Private Admonishment 10, p. 24. See also Com. on Jud. Performance, Ann. Rep. (2014), Advisory Letter 28, p. 24 (judge, in open court and in front of the client, threatened to report an attorney to the State Bar if the attorney had engaged in improper conduct, which had not been determined).

or medical conditions that impair the attorney's ability to competently represent his or her client. In such circumstances, the judge has a duty to take appropriate action, which may include discussing the matter with the attorney or reporting the matter to the State Bar.<sup>448</sup>

When a judge permits a defendant to withdraw his guilty plea due to incompetence of counsel, and the judge determines that the attorney has "intentionally, recklessly, or repeatedly fail[ed] to perform legal services with competence,"<sup>449</sup> the judge must take appropriate corrective action, which would include reporting the conduct to the State Bar.<sup>450</sup>

**Contacting an attorney's supervisor.** Depending on the circumstances, it may be appropriate for a judge to contact an attorney's supervisor as "appropriate corrective action."<sup>451</sup>

**Fraud on the court.** The Ethics Committee of the California Judges Association has advised that a judge, who has personal knowledge that a declarant died before the date on the declaration submitted to the court by an attorney, has a duty to report the conduct both to law enforcement and the State Bar.<sup>452</sup>

**Suspended lawyers.** A judge has a duty to report a suspended attorney to the State Bar if that attorney appears in court while suspended.<sup>453</sup>

**Temporary judge.** A judge has a duty to take corrective action when a temporary judge improperly uses that position during a traffic stop, in advertising, in writing articles about "how to win," and to gain an unfair advantage in litigation.<sup>454</sup>

## § 5:68 Reporting crimes

Judges are in a special position in the courtroom to observe potential criminal conduct, whether it be the perjury of a witness or revelations of crimes emerging from the evidence. What is the judge's ethical obligation to report such criminal conduct? And even if a judge is not obligated to report a crime, are there ethical implications if a judge decides to do so?

There is no easy answer, although some authorities indicate that

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<sup>448</sup>See Cal. Judges Assn., Judicial Ethics Update (1999), p. 3. Rules Prof. Conduct, rule 3-110(A), requires that a lawyer not "intentionally, recklessly, or repeatedly fail to perform legal services with competence." Rules Prof. Conduct, rule 3-110(B), provides that "competence" includes the "mental, emotional, and physical ability reasonably necessary for the performance of such service."

<sup>449</sup>Rules Prof. Conduct, rule 3-110(A).

<sup>450</sup>Cal. Judges Assn., Judicial Ethics Update (2006), p. 2. See Bus. & Prof. Code, § 6086.7, subd. (a)(2).

<sup>451</sup>See *Handbook*, § 3:16 (propriety of contacting an attorney's supervisor).

<sup>452</sup>Cal. Judges Assn., Judicial Ethics Update (2001), p. 3.

<sup>453</sup>*Ibid.*

<sup>454</sup>*Id.* at pp. 3-4.

there is no additional legal duty imposed on a judge that is different from the duty of an ordinary citizen.<sup>455</sup> Generally, with limited exceptions, an ordinary citizen has no duty to report a crime. Only those who witness certain violent crimes against children under the age of 14,<sup>456</sup> and mandated reporters who know of or reasonably suspect abuse or neglect of children, e.g., teachers, social workers, therapists, clergy,<sup>457</sup> are required to report such offenses. Based on different provisions in the Code of Judicial Ethics, there are arguments on both sides of the issue whether a judge is required to report crimes.

Canon 2A of the Code of Judicial Ethics provides that a judge “shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Thus, one can argue that judges have a special duty to promote public confidence in the judicial institution, which confidence would be eroded if the public perceived that judges look the other way when they hear evidence that a crime has been committed by any of the parties in a case pending before the judge. Under this view, a judge might be expected to do more than an ordinary citizen would be required to do upon learning that someone else had committed a crime.

On the other hand, canon 3 requires that judges perform all of their judicial duties impartially. Thus, given the enormous burden to remain impartial and be perceived as such throughout proceedings before the court, a judge could properly conclude that his or her impartiality, or the perception of the same, would be impaired were the judge to initiate prosecution of those appearing before the court. It is one thing for a judge to render decisions against people who commit crimes, but it is quite another thing to be the initiator of a criminal prosecution against a party.

**The obligation of a judge to report a crime that takes place in the courtroom is the same as that of an ordinary citizen, unless the judge is the only person who has knowledge of the criminal conduct.** A judge was disciplined for failing to report substantial and uncontroverted evidence, learned during an in-chambers conference, that court-appointed attorneys were misappropriating funds.<sup>458</sup> This case suggests that, although a judge may have the same duty as an ordinary citizen to report criminal conduct, if a judge is in a position in which he or she is the only person with knowledge of the criminal conduct, he or she may be obliged to report it.

Perjury and tax fraud (especially in family law cases) are two crimes that may be revealed in the course of court proceedings. In such cases,

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[Section 5:68]

<sup>455</sup>See, e.g., Cal. Judges Assn., Judicial Ethics Update (1988), p. 2.

<sup>456</sup>Pen. Code, § 152.3.

<sup>457</sup>*Id.*, §§ 11164–11174.3.

<sup>458</sup>Com. on Jud. Performance, Ann. Rep. (1991), Advisory Letter 9, p. 12.



the lawyers and parties, as well as the courtroom visitors, clerks, court reporters, and bailiffs are all not only aware of what is taking place, but are also in a position to report it. In such circumstances, some judges believe they should report the criminal conduct, whereas others do not, for the reasons noted above.

The Ethics Committee of the California Judges Association has advised that “[a] judge presiding over a trial and learning of a tax fraud by a litigant does not have a duty to report the crime or wrong by a litigant greater than any other citizen. However, if the judge is the only one in a position to report the fraud and does not do so, this may erode the public confidence in the integrity of the judiciary.”<sup>459</sup>

The judge’s principal objective while presiding in court proceedings is the impartial administration of justice. A judge is not expected to bear the additional burden of trying to figure out whether or not the judge is the only person “in a position” to report the criminal conduct, or whether law enforcement is aware of a particular crime. If that were the rule, a judge would have a far greater duty than an ordinary citizen. If, however, the judge is the only person aware of the circumstances, then the judge should act.

Typically, in the ordinary courtroom context, the parties, lawyers, and many other people have the necessary information to report and the interest in doing so. Under these circumstances, the judge is not required to take any action.

**It is not improper to report a crime, but the judge should avoid becoming an advocate or embroiled.** If a judge decides to report a crime, the judge must not attempt to use his or her judicial office, become an advocate in the matter or otherwise attempt to influence the decision of the prosecutorial authority. In a family law case, the court had before it a motion to modify child support from the Ventura County Department of Child Support Services.<sup>460</sup> During the hearing, the father and mother both provided evidence concerning income and expenses.<sup>461</sup> The trial court made findings that both parties had intentionally misrepresented their income and expenses, and made certain determinations

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<sup>459</sup>Cal. Judges Assn., Judicial Ethics Update (1990), p. 3. See also Cal. Judges Assn., Judicial Ethics Update (2001), p. 5 (if a judge was aware that a prosecutor committed a crime and believed the prosecutor’s supervisor would not report it, and the judge was the only person who had knowledge of the criminal conduct, the judge had a duty to report to law enforcement if it was a substantial violation of the law); Cal. Judges Assn., Judicial Ethics Update (2000), p. 3 (if a judge receives reliable information in trial that a crime has been committed, the judge has the same duty as any other citizen to report the crime and should report any significant violations of the law not otherwise known to law enforcement).

<sup>460</sup>*In re Marriage of Calcaterra & Badakhsh* (2005) 132 Cal.App.4th 28, 31.

<sup>461</sup>*Id.* at pp. 32–33.

increasing the amount of support owed from the father.<sup>462</sup> The Court of Appeal, in affirming the trial court's order, made the following comment:

"The courts cannot prevent parties to a dissolution from lying to each other. But, when they lie to the court they do so under penalty of perjury subjecting themselves to criminal prosecution. A trial court is not required to refer such cases to the district attorney or the Internal Revenue Service and the Franchise Tax Board when it believes a crime has been committed. But, it should not be faulted for doing so. [Citation.] If a trial court, in the exercise of its discretion, elects to report a crime to an appropriate agency, it should not become an advocate. It should simply make the referral and let the agency exercise its powers whether or not to go forward."<sup>463</sup>

The judge must also avoid becoming embroiled. In one case, a judge who was presiding over a marriage dissolution trial began to suspect that the husband had committed a crime by neglecting to report a loan on his statement of economic interests as required under the Political Reform Act of 1974. When the husband was testifying, the judge questioned him independently about whether he had disclosed the loan. After ordering and reviewing a transcript of the trial and consulting with two colleagues, the judge concluded that he was obligated to report the violation. He sent the transcript to the litigant's employer instead of the district attorney or the Fair Political Practices Commission, which is responsible for addressing violations of the Political Reform Act.<sup>464</sup>

The Commission on Judicial Performance found that the judge reported the litigant to his employer for a purpose wholly unrelated to the dissolution action before him and that he had "join[ed] the fray" through his investigation and pursuit of the issue.<sup>465</sup> The commission noted that when there are others in the courtroom who have become aware of a potential crime as a result of the proceedings, the judge "is not obliged to report the crime but it is not necessarily improper for the judge to do so. [Citation.] In deciding whether to report a potential crime, a judge must be sensitive to the obligation to remain impartial."<sup>466</sup> The commission concluded that the judge became so personally embroiled as to make him unfit to conduct further proceedings.<sup>467</sup>

**Obligation to take appropriate corrective action under canon 3D.** The "ordinary citizen" rule does not apply to canon 3D obligations to take appropriate corrective action for violations of the Code of Judicial Ethics or the Rules of Professional Conduct. It should be made clear that a judge's duty to take appropriate corrective action, including

<sup>462</sup>*Id.* at pp. 33–34.

<sup>463</sup>*Id.* at p. 38, quoting Rothman, Cal. Judicial Conduct Handbook (2d ed. 1999) § 5.68.

<sup>464</sup>*Inquiry Concerning McBrien* (2010) 49 Cal.4th CJP Supp. 315, 334–338.

<sup>465</sup>*Id.* at p. 337.

<sup>466</sup>*Id.* at pp. 337–338, citing Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 5.68, pp. 253–255.

<sup>467</sup>*Inquiry Concerning McBrien, supra*, at p. 338.

reporting crimes and misconduct, in regard to other judicial officers and attorneys is an affirmative obligation under canon 3D, and is not the same duty as that possessed by an ordinary citizen.<sup>468</sup>

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<sup>468</sup>See *Handbook*, §§ 5:65, 5:67.



## **CALIFORNIA CODE OF JUDICIAL ETHICS**

### **ANNOTATED BY THE CALIFORNIA SUPREME COURT COMMITTEE ON JUDICIAL ETHICS OPINIONS**

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### Canon 3

interest, and in a manner that promotes public confidence in the integrity\* of the judiciary. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees above the reasonable value of services rendered.

#### *ADVISORY COMMITTEE COMMENTARY: Canon 3C(5)*

*Appointees of a judge include assigned counsel and officials such as referees, commissioners, special masters, receivers, and guardians. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Canon 3C(5).*

#### ➤ **CJEO Historical Notes:**

*Commentary following canon 3C(5) amended effective January 1, 2013; adopted effective January 15, 1996.*

*Canon 3C amended effective October 10, 2018; previously amended effective August 19, 2015, January 1, 2013, April 29, 2009, and December 22, 2003; adopted effective January 15, 1996.*

### **D. Disciplinary Responsibilities**

(1) Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, that judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority. (See Commentary to Canon 3D(2).)

(2) Whenever a judge has personal knowledge,\* or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority.

#### ➤ **CJEO Annotation:**

An appellate presiding justice has an affirmative duty to take appropriate corrective action if the justice has personal knowledge that an attorney committed misconduct for violated any provision of the Rules of Professional Conduct. Appropriate corrective action may include reporting the attorney to the State Bar of California [CJEO Oral Advice Summary 2018-024](#), *Reporting Misconduct by a Superior Court Research Attorney in a Pending Matter*, Cal. Supreme Ct., Com. Jud. Ethics Opns., pp. 3-4.

#### *ADVISORY COMMITTEE COMMENTARY: Canons 3D(1) and 3D(2)*

*Appropriate corrective action could include direct communication with the judge or lawyer who has committed the violation, writing about the misconduct in a judicial decision, or*

*other direct action, such as a confidential referral to a judicial or lawyer assistance program, or a report of the violation to the presiding judge, appropriate authority, or other agency or body. Judges should note that in addition to the action required by Canon 3D(2), California law imposes additional mandatory reporting requirements to the State Bar on judges regarding lawyer misconduct. See Business and Professions Code sections 6086.7 and 6086.8, subdivision (a), and California Rules of Court, rules 10.609 and 10.1017.*

*“Appropriate authority” means the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported.*

➤ **CJEO Historical Note:**

*Commentary following canons 3D(1) and 3D(2) amended effective October 10, 2018; previously amended January 21, 2015, January 1, 2013 and March 4, 1999; adopted effective January 15, 1996.*

(3) A judge shall promptly report in writing to the Commission on Judicial Performance when he or she is charged in court by misdemeanor citation, prosecutorial complaint, information, or indictment with any crime in the United States as specified below. Crimes that must be reported are: (1) all crimes, other than those that would be considered misdemeanors not involving moral turpitude or infractions under California law; and (2) all misdemeanors involving violence (including assaults), the use or possession of controlled substances, the misuse of prescriptions, or the personal use or furnishing of alcohol. A judge also shall promptly report in writing upon conviction of such crimes.

If the judge is a retired judge serving in the Assigned Judges Program, he or she shall promptly report such information in writing to the Chief Justice rather than to the Commission on Judicial Performance. If the judge is a subordinate judicial officer,\* he or she shall promptly report such information in writing to both the presiding judge of the court in which the subordinate judicial officer\* sits and the Commission on Judicial Performance.

(4) A judge shall cooperate with judicial and lawyer disciplinary agencies.

**ADVISORY COMMITTEE COMMENTARY: Canons 3D(3) and 3D(4)**

*See Government Code section 68725, which requires judges to cooperate with and give reasonable assistance and information to the Commission on Judicial Performance, and rule 104 of the Rules of the Commission on Judicial Performance, which requires a respondent judge to cooperate with the commission in all proceedings in accordance with section 68725.*

➤ **CJEO Historical Note:**

*Commentary following canons 3D(3) and 3D(4) adopted effective January 1, 2013.*

(5) A judge shall not retaliate, directly or indirectly, against a person known\* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

➤ **CJEO Historical Note:**

*Canon 3D amended effective August 19, 2015; previously amended effective January 1, 2013, January 1, 2008, March 4, 1999, and June 19, 1997; adopted effective January 15, 1996.*

**E. Disqualification and Disclosure**

(1) A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.\*

*ADVISORY COMMITTEE COMMENTARY: Canon 3E(1)*

*The term “proceeding” as used in this canon encompasses prefiling judicial determinations. Thus, if a judge has a disqualifying interest in a matter, the judge is disqualified from taking any action in the matter, even if it predates the actual filing of a case, such as making a probable cause determination, signing a search or arrest warrant, setting bail, or ordering an own recognizance release. Interpreting “proceeding” to include prefiling judicial determinations effectuates the intent of the canon because it assures the parties and the public of the integrity\* and fairness of the judicial process.*

➤ **CJEO Historical Note:**

*Commentary following canon 3E(1) adopted effective December 1, 2016.*

➤ **CJEO Annotations:**

Disqualification is not required under Civil Procedure Code section 107.1(a)(2) for a prior appearance as a deputy district attorney in a nonsubstantive matter without any active participation. [CJEO Formal Opinion 2015-007](#), *Disqualification for Prior Appearance as a Deputy District Attorney in a Nonsubstantive Matter*, Cal. Supreme Ct., Com. Jud. Ethics Opns., p. 14.

In most instances, a judicial officer may decline to disqualify himself or herself when the judge's spouse provides campaign services to reelect the head of a government legal office and attorneys from that office, but not the head of the office, appear as counsel in a proceeding. [CJEO Informal Opinion Summary 2018-005](#), *Disqualification for Spouse's Political Campaign Services*, Cal. Supreme Ct., Com. Jud. Ethics Opns., pp. 3-7.

Disqualification is not required under Civil Procedure Code section 170.1 if the judge's spouse's law firm's landlord is an attorney for a party in the matter. [CJEO Informal](#)